Undoubtedly some support for the contention that the company did not in fact deduct tax is to be derived from the case of *Neumann* v. *Commissioners of Inland Revenue* [1]. Without deciding that matter their Lordships are prepared to deal with this case (as the learned Chief Justice did) on the assumption that tax was not deducted. In that event, however, subsection (6) has effect. Their Lordships cannot accept the contention that subsection (6) does not affect or enter into the machinery provided by subsections (3), (4) and (5). The initial words of subsection (6) "For the purposes of this section" show that it is intended to apply throughout the whole section. Moreover if it did not do so, it would seem to serve no purpose.

The whole section, therefore, must in their Lordships' opinion be read as containing machinery applicable alike to cases where there has been deduction of tax and cases where although there has been no deduction of tax, the dividend is deemed to be a dividend of a gross amount which after deduction of tax would be equal to the net amount paid.

Thus section 40 provides a sensible and intelligible scheme. The company can by deduction (or deemed deduction) of tax from the dividends paid to shareholders recoup itself for any tax payable by it. A running account is allowed whereby the company can carry forward any amounts for which it has hitherto failed to recoup itself in respect of tax payable by it in previous years. As soon however as it collects from its shareholders more tax than it has had to pay, the excess becomes due to the Government. There is, however, no provision by which it can retain the excess and carry it over against its future indebtedness for tax. It cannot recoup itself in advance. Nor is this surprising. No general hardship is created by this scheme. A particular hardship may arise in a case like the present where the holding company chose to pay out an increased dividend (with the consequent increased deduction of tax) in the same year as it received an increase from the B. Company with the result that the tax deducted by the company from its shareholders has to be taken into account in 1956 whereas the tax which the company will have to pay in respect of the increased dividend so received from the B. Company will not be payable or fall to be taken into account until the following year. And by that time the Government have already become entitled to any excess created by the increased deduction of tax in 1956. Such a situation would not arise in the case of an ordinary trading company which does not distribute its profits during the year in which they are earned but in the following year which is the year of assessment in respect of those profits.

Mr. Bucher's ingenious contention that the words of subsection (6) which came into effect on 1st January, 1956 are only applicable to dividends issued after that date necessitates reading the words "has been paid" as if they were "shall after the commencement of this Act have been paid". Their Lordships do not feel able so to read them. The calculation under subsection (3) is a calculation to be made after the Ordinance comes into force but in making that calculation it is deemed that dividends which have in the past been paid without deduction of tax were gross dividends producing the net figure actually paid.

In their Lordships' opinion the view taken by the learned Chief Justice was correct. They will accordingly report to the Head of the Federation of Malaya as their opinion that the appeal ought to be allowed and the judgment of the Court of Appeal set aside and the judgment of Smith J. restored, and that the respondents ought to pay the appellant's costs of the appeal to the Court of Appeal and the costs of this appeal.

Appeal allowed.

Solicitors: *Wray Smith & Co.; Peacock & Goddard.*

ABDUL AZIZ v. PUBLIC PROSECUTOR

[A. Cr. J. (Ali J.) November 18, 1962]

[Muar — Criminal Appeal No. 30 of 1962]

Criminal Law — Criminal breach of trust — Penal Code, s.408 — Failure to account.

Criminal Procedure — Charge of criminal breach of trust — Inference of guilt.

In a charge of criminal breach of trust mere failure to account is not sufficient evidence of misappropriation. It is necessary to examine from the surrounding circumstances and to be satisfied whether misappropriation can be inferred.

MAGISTRATE'S CRIMINAL APPEAL.

R. Ramason for the appellant.

Syed Agil Barakbah (Deputy Public Prosecutor) for the respondent.

Ali J.: The appellant in this case was convicted of an offence of criminal breach of trust under section 408 of the Penal Code in respect of 2,500 lbs. of agropon.

At the commencement of the trial three separate charges were framed against the appellant and each of these charges was related to three specific dates on which misappropriation or conversion of agropon was alleged to have occurred. It appears clear from the evidence that these dates had been used in the charges as they were the dates on which the receipts of the supplies of agropon were acknowledged by the appellant. The total amount of agropon supplied on these three different occasions was 2,500 lbs. It was obviously the case of the prosecution that as there was a shortage of more than 2,500 lbs. of agropon at the end of the year 1961 the appellant not being in a position to account for the amount of 2,500 lbs. being part of the total shortage was guilty of misappropriation. This in my opinion clearly indicates the uncertainty in the mind of the prosecution as to the actual

amount which was alleged to have been misappropriated by the appellant. On this ground alone the appeal should be allowed.

It should, however, be pointed out that the date in the third charge was the 19th of August, 1961, and this was clearly subsequent to the visit of Mr. Murphy, the auditor, who on the 30th July, 1961, found that there was a balance in the store of 462½ lbs. of agropon. This evidence of Mr. Murphy could only lead to the conclusion that if there was in fact any misappropriation, the amount specified in the first two of the original charges had left a balance of 462½ lbs. I mention this part of the prosecution evidence to illustrate the nature of the confusion in the minds of those responsible for the prosecution which must have resulted in the appellant being placed in a position of not knowing what he was being charged with.

The learned President at the close of the prosecution case acting in pursuance of section 153(ii) of the Criminal Procedure Code amended the charges by framing a single charge alleging misappropriation of 2,500 lbs. of agropon between the dates mentioned in the first and that in the last of the three original charges. It was clear from one of the reasons given by the learned President that the prosecution had not proved that any particular quantity of agropon had been misappropriated on any of the dates mentioned in the three original charges. The learned President, however, was of the view that the gross amount of 2,500 lbs. of agropon had been misappropriated between 6th May, 1961, and 19th August, 1961. In view of Mr. Murphy's visit on the 30th July, 1961, it is difficult to understand how the learned President arrived at this conclusion. The appellant was called for his defence on the amended charge and it was not surprising from the evidence given in his defence that he was not in a position to say anything more than that he knew nothing about what had happened to the missing agropon. The conviction in this case was clearly founded on the evidence of the appellant's failure to account for the shortage. In a charge of criminal breach of trust mere failure to account is not sufficient evidence of misappropriation. It is necessary to examine from the surrounding circumstances and to be satisfied whether misappropriation can be inferred. In this case the learned President appeared to have drawn such inferences from the loss of the stock book and the failure of the appellant to report such loss to his superior officers. It was clearly in evidence that the stock book was on the table when the appellant was on leave. It was also in evidence that no one in the office at Batu Pahat seemed to have any knowledge what the stock book looked like. To draw inferences of guilt as the learned President had done in this case was in my view clearly unreasonable.

I accordingly quashed the conviction and ordered that the appellant be acquitted and discharged.

Appeal allowed.

CHUA CHEE CHOR v. CHUA KIM YONG & ORS.

[P. C. (Lord Morton of Henryton, Lord Keith of Avonholm and Lord Pearce) November 20, 1962]

[Privy Council Appeal No. 64 of 1960]

Practice and Procedure — Trial judge retiring without delivering judgment — Notes "taken and recorded" by trial judge — Parties requesting new judge to decide case — Whether suit is "continued" before another judge — Trengganu Civil Procedure Code, s.75.

Administration of Justice — Retirement of judge before delivering judgment — Undesirability of new judge basing judgment on materials recorded by trial judge — Request by parties to new judge to decide case on evidence recorded — Hardship to parties.

Question of fact — Dissentient judgment in Court of Appeal — Principles — Application.

This was an appeal from the decision of the Federation Court of Appeal ([1960] M.L.J. 127).

The plaintiffs (respondents in this appeal) are sons and widow of another son of one C. deceased and they claimed *inter alia* a bicycle shop in the defendant's (appellant's in this appeal) possession and 242 shares in the Trengganu Bus Co. Ltd. registered in the defendant's name as being part of the estate of the deceased. The defendant who is one of the sons of the deceased denied these claims. The trial before Abdul Hamid J. lasted for nine days after which the learned trial Judge reserved judgment and he later retired before delivering judgment. The case was then heard by Neal J. and both parties made application that Neal J. should decide the case on the evidence as recorded by Abdul Hamid J. who had taken a full note. Neal J. was also provided with copies of the exhibits and the previous submissions of counsel. Neal J. acting under section 75 of the Trengganu Civil Procedure Code held that as the bicycle shop and the shares were specified in the letters of administration to the estate of the deceased, they were the property of the deceased. He further decided as a fact that the shop and the shares were the property of the deceased. On appeal to the Court of Appeal it was held that Neal J. had erred in law in holding that the matter was decided by the letters of administration. The Court of Appeal further by a majority affirmed the finding of fact by Neal J. Before the Judicial Committee of the Privy Council it was contended that (a) Neal J. had no jurisdiction to act as he did because section 75 of the Code did not cover a case where there were no depositions and therefore no recording of the evidence save in the judges notes, and where a hearing was not being "continued" but had already been concluded save in so far as judgment remained to be delivered and (b) even if he had jurisdiction, the course which he adopted was contrary to the principles of justice and the judgment should be set aside and a new trial ordered.

Held: (1) the evidence in this case had been "taken and recorded by a judge" within the meaning of section 75 of the Trengganu Civil Procedure Code, which applied alike to civil and criminal cases, and, further, the hearing was being "continued" before Neal J., who in fact, heard further submissions by counsel;

(2) while the course adopted by Neal J. considered *in vacuo* was plainly undesirable and a precedent not to be followed, the circumstances were very unusual, and the material before the Judge, although a very insecure foundation for disputed questions of fact, was that on which the parties had asked to have the case decided, and its inadequacy affected each party alike;

(3) the procedure which the defendant had requested, and of which he had made no complaint in the courts below, could not be regarded as a denial of justice.

Cases referred to:—

(1) *Bolton* v. *Bolton* [1949] 2 All E.R. 908.

(2) *Coleshill* v. *Manchester Corporation* [1928] 1 K.B. 776.

(3) *Re British Reinforced Concrete Engineering Co. Ltd.'s Application* 45 T.L.R. 186.

(4) *Srimati Bidhabati Devi* v. *Kumar Ramendra Narayan Roy & Ors.* [1949] A.C. at p. 521.